BEFORE THE FOREST PRACTICES APPEALS BOARD
STATE OF WASHINGTON

T.C. LUMBER. MERTON H. COREY, and GEORGE E. THOMPSON.	
Appellants.	**FPAB No. 93-72**
v.	
STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,	**FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
Respondent.	

This matter came on for hearing before the Forest Practices Appeals Board, the Honorable William A. Harrison, Administrative Appeals Judge, presiding, and Board Members Norman L. Winn and Robert E. Quoidbach.

The matter is an appeal from a civil penalty of $1,800 assessed by respondent Department of Natural Resources, against appellants.

Appearances were as follows:

1. Merton H. Corey and George E Thompson, pro se for T.C Lumber.

2. Cheryl Nielson, Assistant Attorney General, for respondent Department of Natural Resources

The hearing was conducted at Seattle on September 23 and 24, 1993. Gene Barker and Associates provided court reporting services.

Witnesses were sworn and testified. Exhibits were examined From testimony heard and exhibits examined, the Forest Practices Appeals Board makes these

FINDINGS OF FACT

I

In the fall of 1991, Mr Merton H. Corey and Mr. George E. Thompson, operated a logging business. as partners, under the name of T.C. Lumber. About that time also they acquired 80 acres of forest land south of Sequim Bay in Clallam County.

II

Initially, Mr. Corey and Mr. Thompson, appellants herein, sought to log the entire 80 acres. Upon presenting this plan to respondent, State Department of Natural Resources (DNR), they were advised against it. By conference with the State Department of Wildlife, DNR knew of a nearby siting of a pair and juvenile of Northern Spotted Owl, a threatened species under federal law. Both Wildlife and DNR advised appellants that the southernmost 10 acres of the 80 contained suitable owl habitat within .7 of a mile of the owls. Moreover, the acreage of owl habitat then remaining in that circle was less than 500 acres, to wit, 297 acres. In a larger circle of 2.2 miles from the owl site center, only 23% of suitable habitat remained. These conditions indicate the potential for a significant adverse effect upon critical habitat of the owl. Both DNR and Wildlife advised appellants of this. The DNR advised that an environmental checklist would be needed if the entire 80 acres were proposed for logging.

III

In the spirit of helpfulness. DNR suggested to appellants that it file an application for the 70 acres north of the identified 10 acres of owl habitat. Appellants did so and DNR approved that application in October, 1991. At no time did appellants apply to log the 10 acres of owl habitat.

IV

The approved application. for 70 acres only, provided that:

1. *Operation is restricted to existing roads and skid roads.*
2. *Mobil yarding systems are restricted to slopes of 30% or to existing skid roads*
3. *Waterbar skid trails where their grades exceed 15%*

In addition, timber harvest on the southern portion of the 70 acres was restricted by the approved application to August 31 through March 15 of any year.

V

The DNR forester met with appellants on site. He discussed with them the conditions relating to existing roads and trails and restrictions on skidding. He marked on the ground 11 locations for waterbars. A biologist from Department of Wildlife pointed out to appellants, on the ground, the 10 acres of owl habitat.

VI

In October, 1992, the approved application was renewed by DNR on the same terms. The appellants began logging the property thereafter, in the winter months.

VII

Both appellants personally conducted the logging as hereafter described. First, a new main haul road was built across adjacent DNR land under DNR lease or approval. Second, at least 682 feet of new skid trail was constructed, and up to 4,000 feet of skid trail was widened or reconstructed. This consisted of reopening skid trails of 8 foot width by use of a cat blade 12 feet wide. Skidders were operated on slopes in excess of 30%. Only 2 of 11 waterbars were constructed successfully. Two others failed. The rest were never built.

VIII

In addition, a skid trail was constructed into the 10 acres of owl habitat. The appellants logged and removed the largest and most valuable trees from that habitat. The result was to leave the 10 acres unsuitable for owl habitat.

IX

We take official notice that timber prices were at an all time high in the spring of 1993. Appellants logged the 10 acres into April 1993, until their equipment became mired. Approximately 56 MBF were removed from the owl habitat. Because they harvested for only two days and their operating expenses were minimal, appellants were probably left with a substantial profit.

X

In June, 1993, a U.S. Forester reported the logged owl habitat to DNR. On June 14, 1993, DNR issued a "stop work order" to correct whatever by that time could be corrected. This was not served personally. It was sent by certified mail. Appellants claim they were not home when the Postal Service attempted to deliver the certified mail. The appellants knew, however, of the attempted delivery and of the availability of the mail at the Post Office. Appellants elected not to pick up that mail.

XI

The combination of all logging activity on the site has made it probable that with the return of winter rains, erosion from the site will enter an adjacent seasonal creek which flows to a nearby fish bearing stream known as Jimmy Come Lately Creek.

XII

The appellants have been logging operators since at least 1991 Their prior contacts with DNR include:

1. An approved forest practices application to 1991 to partial cut 65 acres.

2. A Notice to Comply issued in connection with the above dated March, 1992. Appellants were cited for poor maintenance and potential for erosion of road surface to a creek.

3. A Stop Work Order in connection with logging a separate and distinct parcel without an approved forest practice application. This was dated June 5, 1992. An attempt by the DNR Forester to serve this order on Mr. Corey resulted in Mr. Corey refusing acceptance of the order and compelling the DNR Forester to leave under threat. The order was later served by the DNR Forester and the Sheriff.

4. An Assessment of Civil Penalty in the amount of $1,250 on the same facts as paragraph 3., above.

XIII

On July 8, 1992, DNR personally served upon appellants an Assessment of Civil Penalty in the amount of $1,800. This cited the following events in violation of the Forest Practices Act, chapter 76.09 RCW or implementing regulations:

> 1 "TC Lumber logged approximately 10 acres without an approved Forest Practice Permit."
>
> 2. "Deviation of approved permit failure to install waterbars."
>
> 3. "Forest Practices Deviation (Equipment on slopes over 30%) "
>
> 4 "Deviation from an approved forest practice (building new skid trails and a new haul route road)."

No single statutory or regulatory citation exceeded $500 in the DNR Assessment.

XIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The governing statute in this matter is RCW 76.09.170. It provides, in pertinent part:

> *Every person who fails to comply with any provision of RCW 76.09.010 through 76.09.280 as now or hereafter amended or of the forest practices regulations shall be subject to a penalty in an amount of not more than five hundred dollars for every such violation. Each and every such violation shall be a separate and distinct offense. Every person who through an act of commission or omission procures, aids or abets in the violation shall be considered to have violated the provisions of this section and shall be subject to the penalty herein provided for .*

II

A regulation implementing the Forest Practices Act, WAC 222-20-060 provides, in pertinent part:

> *Substantial deviation from a notification or an approved application requires a revised notification or application ...*

III

Appellants substantially deviated from an approved application by 1) operating beyond existing roads and skid trails, 2) operating a mobile yarding system on slopes in excess of 30% and 3) failing to construct required waterbars. We are unpersuaded that any of these deviations are diminished by the existence of prior 8 foot wide skid roads. WAC 222-30-070(7)(a) provides:

> *Skid trails shall be kept to the minimum feasible width*

Appellants' action in widening existing skid trails by 50% (from 8 feet to 12 feet) is inconsistent with the approved application, the rule requiring minimum feasible width and the

pre-harvest discussion with the DNR Forester on the ground. Appellants violated WAC 222-20-060 by taking the actions above without seeking or obtaining a revised application approval from DNR.

IV

The Forest Practices Act, at RCW 76.09.050(2) states that:

> *No Class II, Class III or Class IV forest practice shall be commenced or continued after January 1, 1975, unless the department has . approved an application with regard to a Class III or Class IV forest practice .*

The implementing regulation, WAC 222-20-010, is to the same effect.

V

By logging and constructing skid road in the 10 acres of Northern Spotted Owl habitat, appellants conducted either a Class III or Class IV forest practice. They did so without an approved application. Class IV forest practices involve critical wildlife habitat. WAC 222-16-050. Class III forest practices are the residuary of all forest practices that are neither minor nor Class IV. Id. Appellants logging and construction of skid road in the owl habitat was in violation of RCW 76.09 050(2) and WAC 222-20-010.

VI

Appellants urge that if they had sought an application for logging the owl habitat 1) it would have been denied and 2) that denial would constitute an unconstitutional taking of property without just compensation. Yet none of that goes beyond speculation. The appellants never filed an application to resolve matters lawfully Instead, they proceeded outside the law to log without an application. That is the only certain point, and the one on which the violation should be affirmed.

VII

Amount of penalty. The DNR has identified three factors in assessing these penalties: 1) lack of cooperation by the operator, 2) prior knowledge of the operator and 3) damage to public resources. Each of these factors serve to justify the penalty imposed. We would also conclude, whether as part of the foregoing or separately, that the purpose of a civil penalty is to deter unlawful conduct. Because of the statutory limitation of $500 per violation, this penalty can deter only feebly. By the volume of timber removed from owl habitat alone, appellants can expect to profit from their willful violation of the law. This type of action has prompted the Legislature recently to increase the allowable civil penalty from $500 per violation to $10,000 per violation. Chapter 482, Section 2, Laws of 1993. Appellants should note this if they plan to continue in business as logging operators. The penalty assessed in this matter is fully justified.

VIII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. From the foregoing, the Board issues this:

ORDER

The violations and civil penalties are each affirmed.

DONE at Lacey, WA, this 15th day of October, 1993.

William A. Harrison

HONORABLE WILLIAM A. HARRISON
Administrative Appeals Judge

FOREST PRACTICES APPEALS BOARD

Norman L. Winn

NORMAN L. WINN, Member

ROBERT E. QUOIDBACH, Member

F93-72F

Concurring Opinion

This appeal is the first case involving civil penalties imposed by the DNR. Although the civil penalties have been authorized by statute for a considerable period of time, the DNR has not used the penalty provisions until very recently. As a result of a policy review by the Commissioner of Public Lands, the DNR has now determined to place more emphasis on enforcement activities, including the imposition of civil penalties. I personally believe that a strong and creditable enforcement program is essential to a viable ling term timber industry in the state of Washington, and I commend the Department for this new direction.

In this appeal the respondent TC Lumber Company appeared pro se. Nevertheless, TC ably presented its case, including the use of aerial photos and expert testimony, and all of the issues that it raised were fully presented and considered by the Board.

The major violation by TC was logging within designated Spotted Owl habitat without a permit, and in violation of the boundaries and time periods of the permit which was issued by DNR. At the initial field review Mr. Case, the DNR field forester, told TC that the proposed application for the entire eighty acres was likely to be classified as a Class 4 Special because of the Spotted Owl habitat, and that there would be serious problems obtaining approval for the application. He advised TC to submit an application for seventy acres which excluded the owl habitat. TC did so.

The testimony at the hearing by both Mr. Thompson and Mr. Corey was clear and undisputed that they intentionally went into the ten acre Spotted Owl habitat knowing that this was not covered by their approved forest practice application. TC used a bulldozer with a twelve foot blade to clear out and expand previously existing skidder trails within that ten acre tract. In addition, TC constructed more that 500 feet of new skidder trails over steep terrain in excess of thirty percent slope.

Mr. Case estimated that TC took out approximately 56,000 feet of timber from the ten acres within the Spotted Owl habitat. TC did not contradict this testimony. Mr. Case also testified that TC "high graded" this parcel and took out the biggest and the best timber, TC did not contest this testimony. Mr. Corey, on behalf of TC, testified that some of the timber taken out of the ten acre tract was about two feet in diameter. TC also logged in the southern forty acres of the tract through April 11, 1993, although the permit required operations to stop on March 15 because of the Spotted Owl breeding season.

The Appeals Board takes judicial notice that the price of lumber in the Spring of 1993 reached levels which were the highest in many years. TC made a very substantial profit from its willful violation of the Forest Practice application and the Regulations by logging in the Spotted Owl habitat. The penalty requested by DNR is a fraction of the profit made be TC on the sale of the illegally harvested timber.

Another consideration for the Board is the conduct of TC. The undisputed testimony of Mr. Case, the DNR Field Forester, is that when he went over to the property to inspect the results of the harvesting activity he was threatened by Mr. Thompson and Mr. Corey with being physically evicted from the property. Mr. Case returned to the property only with the company of a deputy sheriff and a state patrolman. Further, the testimony is undisputed that TC refused to pick up registered mail containing the stop work order. I do not accept the explanation of TC that it could not get into Port Angeles to pick up the registered letter at the post office.

Mr. Thompson and Mr. Corey obviously feel very strongly that the Washington Department of Wildlife program of owl circles, and the almost certain likelihood that DNR would not approve a forest practice application in the ten acres of Spotted Owl habitat, constitute an unconstitutional taking of their property. The Forest Practice Appeals Board has no jurisdiction to determine constitutional issues such as the taking of private property without just compensation. Mr. Thompson and Mr. Corey had a variety of remedies which they could lawfully pursue to contest the Spotted Owl habitat designation or to request compensation. They did not legally have the alternative of willfully and intentionally violating their forest practices application by harvesting and engaging in road construction in Spotted Owl habitat.

In affirming the penalties imposed by the DNR I have not used the penalty schedule or formula used by the DNR. The schedule of penalties is currently being revised and the formula may also be revised. However, I feel that under the facts of this case the total penalty imposed by the DNR was reasonable, and a substantially higher penalty would have been appropriate if authorized by law.

Dated this 5th day of October, 1993.

Norman L. Winn
Chairman, Forest Practice Appeals Board